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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Justin Weigel,

No. CV 11-086-TUC-BPV

10 Plaintiff,

**ORDER**

11 vs.

12 Michael J. Astrue, Commissioner of Social  
13 Security,

14 Defendant.

15 Plaintiff, Justin Weigel, suffers from the impairments of left ankle trauma, status  
16 post-surgery. In addition, Plaintiff suffers from bipolar disorder and depression. Plaintiff  
17 applied for Disability Insurance Benefits (DIB) on April 26 2005, alleging disability  
18 since October 14, 2004 due to an ankle injury and mental impairments. Tr. 35, 37, 163-  
19 65, 178-91. The application was denied initially, (Tr. 73), on reconsideration (Tr. 78), and  
20 after an administrative hearing before an Administrative Law Judge (ALJ) held on  
21 October 17, 2006 (Tr. 39-47). The Appeals Council remanded the ALJ's decision for a  
22 new hearing and decision on July 19, 2007. Tr. 136-39. On April 10, 2008, the ALJ  
23 issued a second unfavorable decision. Tr. 645-57. The Appeals Council again remanded  
24 on December 31, 2008. Tr. 658-61. On April 1, 2009, Plaintiff, through his attorney,  
25 amended his application to request a closed period of disability from October 14, 2004 to  
26 August 31, 2008, due to the fact that he returned to work in September 2008. Tr. 711. The  
27 ALJ issued a written decision on November 6, 2009, finding Plaintiff not disabled within  
28 the meaning of the Social Security Act. Tr. 17-28. This decision became the final

1 decision for purposes of judicial review under 42 U.S.C. § 405(g) when the Appeals  
2 Council denied review. Tr. 6.

3 Plaintiff now brings this action for review of the final decision of the  
4 Commissioner for Social Security pursuant to 42 U.S.C. §§ 405(g). The United States  
5 Magistrate Judge has received the written consent of both parties, and, accordingly,  
6 presides over this case pursuant to 28 U.S.C. § 636 (c) and Fed.R.Civ.P. 73.

7 After considering the record before the Court and the parties' briefing of the  
8 issues, the Court will reverse Defendant's decision and remand for an award of benefits.

### 9 I. STANDARD OF REVIEW

10 The Court has the "power to enter, upon the pleadings and transcript of the record, a  
11 judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
12 Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The  
13 court will set aside a denial of benefits only if the Commissioner's findings are based on  
14 legal error or are not supported by substantial evidence in the record as a whole. *Kail v.*  
15 *Heckler*, 722 F.2d 1496, 1497 (9<sup>th</sup> Cir. 1984) (citing *Sample v. Schweiker*, 694 F.2d 639,  
16 642 (9<sup>th</sup> Cir.1982), *Thompson v. Schweiker*, 665 F.2d 936, 939 (9<sup>th</sup> Cir, 1982)); 42 U.S.C.  
17 § 405(g). The Commissioner concedes that the Commissioner's final decision is not  
18 supported by substantial evidence, and thus, judgment should go to Plaintiff. (Doc. 22, at  
19 1)

### 20 II. DISCUSSION

21 Whether a claimant is disabled is determined using a five-step evaluation process. To  
22 establish disability, the claimant must show (1) he has not worked since the alleged  
23 disability onset date, (2) he has a severe impairment, and (3) his impairment meets or  
24 equals a listed impairment or (4) his residual functional capacity (RFC) precludes him  
25 from performing his past work. At step five, the Commissioner must show that the  
26 claimant is able to perform other work. *See* 20 C.F.R. §§ 404.1520, 416.920.

27 In her decision, the ALJ found Plaintiff did not engage in substantial gainful activity  
28 from October 14, 2004, his alleged onset date, through August 31, 2008, the day before

1 he returned to work. Tr. 19. At step two, the ALJ found Plaintiff had left ankle trauma,  
2 status post-surgery times two, an impairment that was “severe” pursuant to the  
3 regulations. Tr. 19-21. At step three, the ALJ found Plaintiff did not have an impairment  
4 or combination of impairments that met or medically equaled one of the listed  
5 impairments in 20 C.F.R. pt. 404, subpt. P, app. 1. Tr. 21-22.

6 The ALJ found Plaintiff had the residual functional capacity to perform  
7 sedentary work as follows:

8 [I]s able to stand/walk slightly less than two hours a day and sit for six  
9 to eight hours a day; should avoid climbing ladders, ropes, and scaffolds; is  
10 able to occasionally stoop and climb ramps; should avoid  
11 kneeling, crouching and crawling; is able to rarely climb stairs; should  
12 avoid pushing/pulling of foot controls with his left foot; must  
13 occasionally use a cane and is able to walk 50 yards at a time on uneven  
14 surfaces; is able to operate a motor vehicle frequently; should avoid  
unprotected heights and work around moving machinery; should avoid  
extreme ability to function socially and maintain concentration, pace,  
and persistence.

15 Tr. 22-26. At step four, the ALJ found Plaintiff was unable to perform any of his  
16 past relevant work as a deputy sheriff and security guard, and dent repair technician. Tr.  
17 26. At step five, relying on vocational expert testimony, the ALJ found Plaintiff could  
18 perform other work existing in significant numbers in the national economy, including  
19 the jobs of assembler, order clerk, and sorter. Tr. 26-28. Therefore, the ALJ found  
20 Plaintiff was not disabled at any time from October 14, 2004 through the date of her  
21 decision. Tr. 28.

22 The Commissioner concedes that The ALJ committed reversible error by not  
23 mentioning Dr. Kuntzelman’s opinions. (Doc. 22, at 4) In particular, the Commissioner  
24 did not mention the September 2005 treating source opinion of Michael Kuntzelman,  
25 Plaintiff’s treating psychiatrist. Tr. 276-79. Dr. Kuntzelman stated that Plaintiff was able  
26 to perform, but would have noticeable difficulty (distracted from job activity) from 11 to  
27 20 percent of the workday or workweek (*i.e.*, more than one hour per day or more than  
28 one-half day per week) in the following activities:

- 1 • Maintaining attention and concentration for extended periods of time;
- 2 • Working in coordination with or proximity to others without being distracted by
- 3 them;
- 4 • Accepting instructions and responding appropriately to criticism from supervisors;
- 5 and
- 6 • Traveling to unfamiliar places or using public transportation.

7 He stated Plaintiff was able to perform, but would have noticeable difficulty  
8 (distracted from job activity) more than 20 percent of the workday or workweek (*i.e.*,  
9 more than one hour and up to two hours per day or one-half to one day per week) with  
10 respect to completing a normal workday and workweek without interruptions  
11 from psychologically-based symptoms and to perform at a consistent pace without  
12 an unreasonable number and length of rest periods. Dr. Kuntzelman concluded that  
13 Plaintiff could work only four hours per day, five days per week. Tr. 276-79.

14 Plaintiff submits that if the Court finds error, the Court has a choice of judicial relief;  
15 the court can make a finding of clear disability or enter judgment reversing the final  
16 decision with a remand for further administrative proceedings. (Doc. 16, at 14) Similarly,  
17 Defendant states that a court has discretion to remand for further proceedings when the  
18 final decision of the Commissioner is not supported by substantial evidence or is not free  
19 from legal error, and that the choice to remand is discretionary and rests upon the utility  
20 of further proceedings. (Doc. 22, at 4)(citing *Bunnell v. Barnhart*, 336 F.3d 112, 1114,  
21 1115-16 (9<sup>th</sup> Cir. 2003). Not surprisingly, Plaintiff petitions the court to find Plaintiff  
22 clearly disabled at step five, while the Commissioner submits that additional  
23 administrative proceedings would not only be useful in this case, but are necessary to  
24 reach an informed decision.

25 Plaintiff asserts that the Commissioner has taken the position that the Social Security  
26 Act does not authorize a court to hold that a claimant is disabled. To the extent Plaintiff  
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1 may have correctly characterized the Commissioner's argument;<sup>1</sup> the Court rejects such a  
2 narrow restriction on this Court's authority. The Social Security Act grants a court  
3 express authority to determine that a plaintiff is entitled to benefits without remanding to  
4 the Social Security Administration for further administrative proceedings. *See* 42 U.S.C.  
5 § 405(g) ("The court shall have power to enter, upon the pleadings and transcript of the  
6 record, a judgment affirming, modifying or reversing the decision of the Commissioner  
7 of Social Security, with or without remanding the cause for a rehearing."); *see also*  
8 *Harman v. Apfel*, 211 F.3d 1172, 1177 (9<sup>th</sup> Cir. 2000) (Section 405(g) decision to remand  
9 for further proceedings or direct a payment of decisions based solely upon the  
10 administrative record necessarily rests in the discretion of the district court (citing  
11 *Reddick v. Chater*, 157 F.3d 715, 728 (9<sup>th</sup> Cir. 1998), and cases discussed therein).

12 Plaintiff argues that, on the record, the Court should hold that Weigel was clearly  
13 disabled at step five in light of Dr. Kuntzelman's September 2005 opinions at issue.  
14 (Doc. 16, at 14) (citing *Benecke v. Barnhart*, 379 F.3d 587, 593-94 (9<sup>th</sup> Cir. 2004)). The  
15 Commissioner challenges this assertion as the improper application of the so called  
16 "credit-as-true" rule, arguing that it is inconsistent with the Act and with the standards  
17 used by other Courts of Appeals in reviewing denials of Social Security disability  
18 benefits.

19 As Plaintiff submits, however, this Circuit has clearly held that an action should be  
20 remanded for an award of benefits where the ALJ has failed to provide legally sufficient  
21 reasons for rejecting evidence, no outstanding issue remains that must be resolved before  
22 a determination of disability can be made, and it is clear from the record that the ALJ  
23 would be required to find the claimant disabled were the rejected evidence credited as  
24 true. *See, e.g., Varney v. Sec'y of HHS*, 859 F.2d 1396, 1400 (9<sup>th</sup> Cir. 1988) (*Varney II*);

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26 <sup>1</sup> The Court does not find that the Commissioner is making such a broad argument,  
27 but rather is making a more narrow argument against the Court's ability to "credit-as-  
28 true" evidence that has not been first considered by the Agency. The Court will address  
the "credit-as-true" argument in turn, but will first briefly address Plaintiff's  
characterization of the broader argument that this Court is without authority to hold that a  
claimant is disabled.

1 *see also Benecke*, 379 F.3d at 593 (citing *Harman*, 211 F.3d at 1178).

2 The parties concede that the ALJ failed to provide legally sufficient reasons for  
3 not considering and therefore by implication, improperly rejecting Dr. Kuntzelman's  
4 opinion. No outstanding issue remains to be resolved before determining that Plaintiff is  
5 entitled to the reinstatement of benefits. The impartial vocational expert testified that  
6 application of Dr. Kuntzelman's opinion with regard to Plaintiff's mental impairments  
7 together with the ALJ's RFC with regard to Plaintiff's non-mental impairments, would  
8 result in the conclusion that such a person would be unable to perform Plaintiff's past  
9 work or other work within the national economy. Tr. 832-33. Defendant did not object to  
10 this factual finding. Because it is clear that the ALJ would be required to find  
11 Plaintiff disabled, the Court will remand the case for an award of benefits. *See Benecke*,  
12 379 F.3d at 593-95 (remanding for an award of benefits where no outstanding issues  
13 remain and ALJ would be required to find claimant disabled if evidence is credited);  
14 *Regennitter v. Comm'r of Soc.Sec.Admin.*, 166 F.3d 1294, 1300 (9<sup>th</sup> Cir. 1999) (where the  
15 court "conclude[s] that...a doctor's opinion should have been credited and, if credited,  
16 would have led to a finding of eligibility, we may order the payment of benefits."); *Lester*  
17 *v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995), (remanding for payment of benefits because,  
18 after crediting doctor's opinion as true, inter alia, "the evidence...demonstrates that..." the  
19 plaintiff was disabled.); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990) (remanding  
20 for payment of benefits where the Secretary did not provide adequate reasons for  
21 disregarding examining physician's opinion); *Winans v. Bowen*, 853 F.2d 643, 647 (9<sup>th</sup>  
22 Cir. 1987)(same). As noted by Plaintiff, other than suggesting that the opinions of  
23 examining psychologist Dr. Kroese would be "substantial evidence" of non-disability on  
24 remand, the Commissioner presented no argument that a reasonable ALJ could give  
25 either the "clear and convincing reasons" that Ninth Circuit law requires, *see Lester*, 81  
26 F.3d at 830, or the "good reasons" that the regulations require, *see* 20 C.F.R. §  
27 404.1527(d)(2) (2011), to reject treating psychiatrist Dr. Kuntzelman's September 2005  
28 opinions (Doc. 22. at 1-9). Accordingly, all three factors that the Court must consider

1 support Plaintiff's request to remand the matter for an award of benefits post September  
2 20, 2005. *Benecke*, 379 F.3d at 595 (recognizing that "[r]emanding a disability claim for  
3 further proceedings can delay much needed income for claimants who are unable to work  
4 and are entitled to benefits, often subjecting them to 'tremendous financial difficulties  
5 while awaiting the outcome of their appeals and proceedings on remand.'" (quoting  
6 *Varney II*, 859 F.2d at 1398).

7 Defendant claims that a remand for further development of the record is in  
8 order. Plaintiff applied for disability benefits more than six years ago. He has been  
9 denied at the initial, reconsideration, hearing, and appellate levels of the administration,  
10 and has been remanded twice to the ALJ already for further proceedings. Plaintiff  
11 specifically highlighted Dr. Kuntzelman's restrictions in a memorandum to ALJ prior to  
12 the most recent administrative hearing, (Tr. 50-53), yet, Defendant improperly evaluated  
13 Dr. Kuntzelman's opinion after the third administrative hearing. A remand for further  
14 proceedings is not warranted.

15 IT IS ORDERED:

- 16 1. Defendant's decision denying benefits is reversed.  
17 2. Defendant's motion to remand pursuant to sentence four (Doc. 21) is DENIED.  
18 2. The case is remanded to Defendant for an award of benefits.  
19 3. The Clerk is directed to enter judgment accordingly.

20 Dated this 6th day of March, 2012.

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25 Bernardo P. Velasco  
26 United States Magistrate Judge  
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